BANK KERJASAMA RAKYAT MALAYSIA BHD A

v.

FLAVOUR RIGHT SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU B
VERNON ONG J
[CIVIL SUIT NO: 22A NCVC-40-2011]
30 AUGUST 2012

BANKING: *Banking and banking business - Islamic banking - Loan facilities agreement - Notice of termination and recall of facilities from bank - Whether loan facilities legal and enforceable - Whether guarantors discharged - Whether bank's demand valid and appropriate - Whether interest imposed and levied consistent with Shariah principle* C

The plaintiff and the first defendant had entered into an Islamic loan facilities agreement ('the first facility') amounting to RM56,500,000 and subsequently entered into an additional credit facilities agreement ('the second facility') amounting to RM30,718,000. The agreements were guaranteed by the second, third and fourth defendants who were directors of the first defendant company. However, the plaintiff later issued a notice of termination and recall of the facilities on 15 November 2011 and proceeded to liquidate the first defendant's security deposit of RM15,300,533.11. In the present suit, the plaintiff's claim against the first defendant was for RM60,137,086.96 due and owing under the loan facilities. Since the plaintiff had proven a *prima facie* case, the burden of introducing evidence to prove their defence fell upon the defendants. The defendants' line of defence was based on the allegation by a representative of the second defendant ('Ah Siong'), that the chairman of the plaintiff ('Tan Sri') had undertaken to arrange for loans of up to RM200 million for the consideration of 30% shareholding in the first defendant company for his son-in-law, the fourth defendant, and the appointment of the fourth defendant as a director of the first defendant. The second and third defendants further alleged that in a subsequent meeting with Tan Sri, Ah Siong and one lawyer ('Ti'), Tan Sri had urged the second defendant to sign the board resolution to release the fourth defendant from being a guarantor. To his end, the fourth defendant testified that he wrote a letter to the senior officers of the plaintiff, asking for release and discharge from being D E F G H I

A a guarantor but was informed that such request would be subject to the second and third defendants' approval. This approval was subsequently obtained, and in June 2010, the bank informed the fourth defendant that he had been so released and discharged. The defendants further contended that beside an illegal
B consideration, the plaintiff's entire claim was tainted with illegality and unenforceable under s. 24 of the Contracts Act 1950 because the plaintiff imposed and levied interest/*riba* which was repugnant to Shariah principles. It was also averred that the plaintiff's demand on 15 November 2010 to the first, second and third
C defendants was invalid and bad in law as the amount demanded was excessive and failed to account for rebate *(Ibra)* and other discounts due to the first defendant. The issues for the court's adjudication were: (i) whether the loan facilities were tainted with illegality and/or in breach of public policy and therefore void and
D unenforceable; (ii) whether the second and third defendants were entitled to be discharged from being guarantors and if not, whether there was any proper demand made against the second and third defendants as guarantors; (iii) whether the fourth defendant was released and discharged as a guarantor for the first
E defendant; (iv) whether the plaintiff's demand dated 15 November 2010 to the first, second and third defendants were invalid and bad in law; and (iv) whether the plaintiff's claim was tainted with illegality as the plaintiff imposed and levied interest/*riba*' which was against the Shariah principle;

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Held (order accordingly):

(1) The defendants' contention that the loan facilities granted to the first defendant were tainted with illegality was wholly
G unsubstantiated. The first to third defendants failed to call Ah Siong, who was the principal and key actor, to give evidence in proof of its allegation. It was Ah Siong who allegedly made the representation to the second defendant. Ah Siong's evidence had been clearly withheld by the first to third
H defendants and the court was justified in drawing an adverse inference against the first to third defendants for failing to call Ah Siong under s. 114(g) of the Evidence Act 1950. (para 18)

(2) The contention that the second and third defendants were entitled to be discharged from being guarantors was misplaced.
I There was a proper demand made on the second and third defendants, as guarantors in the guarantee agreement. The

second and third defendants have not satisfied the evidential burden of introducing evidence to prove their allegation. In his testimony, Tan Sri denied making the alleged favour as he did not have the power of releasing the fourth defendant as a guarantor. The second and third defendants also failed to call Ah Siong and Ti to the stand and no explanation was given for this lacuna. The court was therefore constrained to draw an adverse inference against the second and third defendants for their failure to call both material witnesses. (paras 21-24)

(3) The fourth defendant was released and discharged as a guarantor for the first defendant in June 2010. As an outsider, the fourth defendant was not bound to inquire whether the actions of senior officers of the plaintiff bank were regular. The second and third defendants have already signified their consent and agreement to the fourth defendant's release and discharge as guarantor. There was no way for the fourth defendant to know the inner working and inner management procedures of the plaintiff. In the circumstance, the fourth defendant was entitled to rely on the authority of both senior officers of the plaintiff bank to discharge him as a guarantor. (paras 39-41)

(4) The loan facilities granted to the first defendant were in the nature of Islamic banking where interest is prohibited under any circumstances. The fact that the plaintiff was entitled to impose *ta'widh* could not be denied as it was expressly provided under the facilities agreement. However, it was inconceivable for the plaintiff to impose overdue interest on the first defendant when such imposition contravened the very basis of Islamic banking practice. Further, the rate of charge of 1% was consistent with the rate chargeable for *ta'widh* under the offer letters and the loan facilities agreements. (paras 32 & 33)

(5) There was no evidence to show that the defendants have complained to the plaintiff that they have not been given any rebate or other discounts. Rebate was in fact given to the first defendant at the time when the facilities were disbursed. The first to third defendants' contention that no rebate was given to the first defendant was obviously devoid of merit. The granting of other discounts (*ie*, *khusuumah*) was at the absolute

discretion of the plaintiff and would only be granted when the first defendant makes early settlement of the facilities. The issue of the granting of *khusuumah* did not arise as the first defendant failed to repay the principal amount. (paras 35-37)

[The claim against the first to third defendants is allowed; the claim against the fourth defendant is dismissed with costs; and the fourth defendant's counterclaim is allowed in part with costs.]

Case(s) referred to:

Abrath v. North Eastern Railway Co [1883] 11 QBD 440 ***(refd)***

Arab-Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (Third Party) And Other Cases [2009] 1 CLJ 419 HC ***(refd)***

BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar [2009] 4 CLJ 599 CA ***(refd)***

CIMB Islamic Bank Bhd v. LCL Corporation Bhd & Anor [2011] 7 CLJ 594 HC ***(refd)***

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***

Eastern Enterprises Ltd v. Ong Choo Kim [1969] 1 LNS 35 HC ***(refd)***

In Re Duomatic Ltd [1969] 2 Ch 365 ***(refd)***

Karam Singh v. PP [1967] 1 LNS 65 FC

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***

Kopeks Holdings Sdn Bhd v. Bank Islam Malaysia Bhd [2012] 4 CLJ 941 CA ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***

Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626 CA ***(refd)***

Malayan Banking Bhd v. Ya'kup Oje & Anor [2007] 5 CLJ 311 HC ***(refd)***

Metroplex Development Sdn Bhd v. Mohd Mastana Makaddas & Anor [1995] 3 CLJ 70 HC ***(refd)***

Mohd Zaid Ibrahim v. P Kamalanathan P Panchanathan & Ors [2010] 8 CLJ 608 HC ***(refd)***

Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 CLJ 197; [1987] CLJ (Rep) 219 SC ***(refd)***

Mustafa Osman v. Lee Chua (P) [1996] 3 CLJ 494 CA ***(refd)***

Ng Ben Thong & 2 Ors v. Krishnan Arumugam [1997] 1 LNS 85 HC ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Selvaduray v. Chinniah [1939] MLJ 253 CA ***(refd)***

Tan Ah Tong v. Perwira Habib Bank Malaysia Bhd [1998] 3 CLJ 833 CA ***(foll)***

Tasja Sdn Bhd v. Golden Approach Sdn Bhd [2011] 2 CLJ 789 CA ***(refd)***
Thong Foo Ching & Ors v. Shigenori Ono [1998] 4 CLJ 674 CA ***(refd)***
United Prime Corp Bhd v. Q-Built Construction (M) Sdn Bhd & Ors [1987] 1 CLJ 501; [1987] CLJ (Rep) 1048 HC ***(refd)***
Wai Hin Tin Mining Company Ltd v. Lee Chow Beng [1967] 1 LNS 204 HC ***(refd)***
YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2) [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187 SC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24
Evidence Act 1950, ss. 73A(6), 101(1), 102, 103, 114(g)
Islamic Banking Act 1983, ss. 2 & 3(5)

Other source(s) referred to:
Mohamed Ismail bin Mohd Shariff, *Of Islamic "Loans" And Other Matters of Interest*, The Journal of the Malaysian Bar, (2000) XXVIX No 3, p 91

For the plaintiff - Nordin Sulaiman (Jeyasingam Balasingam, Nazeera Hanifa & Lili Nadzirah Ismail with him); M/s Ghazi & Lim
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JUDGMENT

Vernon Ong J:

[1] The plaintiff's claim against the 1st defendant is for monies due and owing under various loan facilities granted to the 1st defendant. The 2nd to 4th defendants are being sued in their capacities as guarantors for the 1st defendant.

Brief Account Of The Facts

[2] By a letter of offer dated 17 March 2008, the plaintiff offered loan facilities amounting to RM56,500,000 to Flavour Right Sdn Bhd (the 1st defendant). The plaintiff amended the 1st facility

under two amended letters of offer dated 1 July 2008 and 30 July 2008 respectively. On 30 July 2008, the parties entered into the following various facility agreements ('the 1st facility'):

(i) a Term Financing-i Facility under the principle of *Bai' Bithaman Ajil* for RM8,920,000;

(ii) a Revolving Credit-i Facility under the principle of *Bai' Al-Inah* for RM36,500,000; and

(iii) Guarantee agreement signed by 2nd, 3rd and 4th defendants.

[3] On 3 June 2009, the plaintiff issued a letter offering additional credit facilities amounting to RM30,718,000 to the 1st defendant. On 4 September 2009 the parties also entered into the following facilities agreement ('the 2nd facility'):

(i) Term Facility-i 2 under the principle of *Bai' Bithaman Ajil* for RM4,858,000;

(ii) Term Facility-i 3 under the principle of *Bai' Alistisna* for RM12,860,000;

(iii) Revolving Credit-i Facility under the principle of *Bai' Al-Inah* for RM13,000,000; and

(iv) Guarantee agreement signed by 2nd, 3rd and 4th defendants.

[4] On 15 November 2010, the plaintiff issued a notice of termination and recall of the facilities to the defendants. On 31 January 2011, the plaintiff liquidated the 1st defendant's security deposit of RM15,300,533.11.

The Plaintiff's Case

[5] The plaintiff's claim against the 1st defendant is for RM60,137,086.96 due and owing under the facilities granted to the 1st defendant. The 2nd, 3rd and 4th defendants were at all material times directors of the 1st defendant company. The claim against the 2nd, 3rd and 4th defendants are on the guarantees given in favour of the 1st defendant.

The 1st, 2nd And 3rd Defendants' Defence

[6] The first line of defence as pleaded is premised on the ground that the consideration for the granting of the loan facilities by the plaintiff to the 1st defendant is illegal; the consideration

being 30% shareholding in the 1st defendant company for the 4th defendant and the appointment of the 4th defendant as a director of the 1st defendant. One Pua Tian Siong ('Ah Siong') had represented to the 2nd defendant that the then chairman of the plaintiff, one Tan Sri Dato' Dr. Syed Jalaludin Syed Salam (Tan Sri) was in a position to arrange for loans up to RM200 million for the 1st defendant's business development plans provided that the 2nd defendant was prepared to give 30% of the equity in the 1st defendant to his son-in-law, one Dato Chairil Nazri bin Ahmad (the 4th defendant). According to Ah Siong, Tan Sri told him that his son-in-law did not have any substantial business to do then and he would like to give the 4th defendant a boost to help the 4th defendant succeed in business. Ah Siong also informed the 2nd defendant that the 4th defendant was prepared to arrange for loan facilities of up to RM200 million from the plaintiff through Tan Sri provided that the 2nd defendant caused to be transferred 30% of the equity in the 1st defendant to the 4th defendant free of charge and appoint the 4th defendant as a director. Therefore, it is contended that the loan facilities granted to the 1st defendant are tainted with illegality and or breach of public policy and therefore void and unenforceable.

[7] Secondly, it is contended that the plaintiff failed to honour the following representations to the 1st defendant; and which representations induced the 1st defendant into accepting the loan facilities from the plaintiff:

(i) that the plaintiff understood that the 1st defendant would require a substantial loan repayment period for the term financing facilities of up to ten years from date of first disbursement; and

(ii) the plaintiff would adjust the profit charged to the 1st defendant's various accounts by granting to the 1st defendant a rebate *(Ibra)* at the end of each month and a discount on the selling price/internal rate of return *(Khusuumah)*.

[8] Thirdly, the 2nd and 3rd defendants contend that they are prejudiced by a statement made by Tan Sri on 1 November 2010 that he is able to get the 4th defendant released as a guarantor of the 1st defendant regardless of whether the 2nd and 3rd defendants consent to his release. As such, the 2nd and 3rd defendants contend that they should be discharged from being guarantors of the loan facilities for the 1st defendant.

[9] Lastly, it is contended that there is no proper demand made against the 2nd and 3rd defendants to found any cause of action against them as guarantors. The plaintiff's demand dated 15 November 2010 to the 1st, 2nd and 3rd defendants is in any event invalid and bad in law for demanding an excessive sum as the plaintiff failed to account for the rebate and other discounts that is due to the 1st defendant and had included interest which the plaintiff is not entitled to.

The 4th Defendant's Defence And Counterclaim

[10] The 4th defendant contends that he had been released and discharged as a guarantor in June 2010 by reason of the following events:

(i) Around end November 2009, the 4th defendant intimated to one En. Yusof Abdul Rahman and one En. Tun Yazli of the plaintiff that he intended to resign as a director of the 1st defendant and to also dispose his shares in the 1st defendant. He also intimated his intention to be released as a guarantor to the facilities given in favour of the 1st defendant. At the material time, the 1st defendant was not in breach of the loan facilities.

(ii) On 12 January 2010, the 4th defendant made a formal request to the plaintiff for his release and discharge as a guarantor. The plaintiff through En. Yusof then represented to the 4th defendant that the plaintiff would agree to release and discharge the 4th defendant as a guarantor on the condition that the 4th defendant obtains the consent and agreement from the co-guarantors (2nd and 3rd defendants). Acting on this representation, the 4th defendant procured the consent of the co-guarantors in satisfaction of the sole condition to his discharge and release.

(iii) On or about June 2010, the plaintiff through En. Tun Yazli informed the 4th defendant that the plaintiff had agreed to the release of the 4th defendant as a guarantor.

[11] By way of counterclaim, the 4th defendant contends that the plaintiff had reneged and breached its agreement to release and discharge the 4th defendant as a guarantor when it issued the demand letters in October and November 2010. The 4th defendant is seeking a declaration that he is discharged and released as a guarantor, damages to be assessed and costs.

Findings Of The Court

[12] In support of its claim, the plaintiff called its Senior General Manager of Corporate Services and acting managing director Dato' Yusof Abdul Rahman (PW1), the Head of Commercial Financing Management Department En. Tun Yazli Hismul Asri Yaacoob (PW2), the manager of Commercial Financing Documentation Department Puan Nuryusmalia @ Amal Taqiah Yusof (PW3) and the manager of Commercial Finance Department Puan Marinah Arshad (PW4).

[13] The facts relating to the existence of the loan facilities to the 1st defendant and the guarantees given by the 2nd to 4th defendants are not in dispute. PW3 testified that in the event of any default in the repayment of the loan facilities, the plaintiff shall be entitled to recall the loan facilities and demand for the outstanding sum including compensation for late payment *('Ta' widh')* pursuant to cls. 7 and 8 in the agreements. According to PW4, the notice of termination and recall of the facilities dated 15 November 2010 issued to the defendants was for the total outstanding amount of RM75,437,620.07. The notices were sent to the defendant in accordance with the mode of service provided in the facilities agreement. PW4 also explained that the amount according to the statement of accounts is RM60,137,086.96 after deducting the security deposit belonging to the 1st defendant amounting to RM15,300,533.11; which security deposit was liquidated on 31 January 2011.

[14] In law, the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s. 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish its case. If the plaintiff fails to do so, it will not do for the plaintiff to say that the defendants have not established their defence (*Selvaduray v. Chinniah* [1939] MLJ 253 CA; s. 102 of the

Evidence Act 1950). It should also be noted that there must be some preponderance in the plaintiff's favour at the conclusion of the whole case. Even if the plaintiff established a *prima facie* case, but at the conclusion of the trial the court found that the position was exactly even, then any preponderance in favour of the plaintiff had ceased to exist. If that happens, then the plaintiff has failed to discharge the burden of proof which is upon it, and the plaintiff must necessarily fail (*Abrath v. North Eastern Railway Co* [1883] 11 QBD 440).

[15] On a consideration of the evidence introduced by the plaintiff aforesaid, the court is satisfied that the plaintiff has made out a *prima facie* case against the defendant on the balance of probabilities. In the premises, the burden has shifted onto the defendants to introduce the necessary evidence to prove their defence.

[16] The defence of the 1st to 3rd defendants relates to the following issues:

1. Whether the loan facilities granted to the 1st defendant are tainted with illegality and/or in breach of public policy and therefore are void and unenforceable?

2. Whether the 2nd and 3rd defendants are entitled to be discharged from being guarantors on the grounds that they are prejudiced by the statement of the 4th defendant's father-in-law that he is able to get the 4th defendant released as a guarantor of the 1st defendant regardless of whether the 2nd and 3rd defendants consent to his release? If not, whether there was any proper demand made against the 2nd and 3rd defendants as guarantors?

3. Whether the plaintiff's claim is tainted with illegality as the plaintiff imposed and levied interest or *riba* which is repugnant to Islamic or Shariah principle rendering the entire claim unenforceable under s. 24 of the Contracts Act 1950.

4. Whether the plaintiff's demand dated 15 November 2010 to the 1st, 2nd and 3rd defendants is invalid and bad in law?

[17] The defence of the 4th defendant relates to the question whether the 4th defendant was released and discharged as a guarantor for the 1st defendant in June 2010?

Whether The Loan Facilities Granted To The 1st Defendant Are Tainted With Illegality And/Or In Breach Of Public Policy And Therefore Are Void And Unenforceable?

[18] This contention is premised on the allegation that the consideration for the granting of the loan facilities by the plaintiff to the 1st defendant was an illegal consideration from the 1st and 2nd defendants, ie, a 30% shareholding in the 1st defendant for the 4th defendant (plaintiff's chairman's son-in-law) and the appointment of the 4th defendant as a director of the 1st defendant. In support of their case, the defendants called Tan Sri (DW4) to the stand. Tan Sri categorically denied making any representation to the defendants. Tan Sri did not deny the fact that he knows Ah Siong, a poultry farmer. Tan Sri explained that as the then chairman of the plaintiff, he did not have any power to approve loans applications; he only had power to reject loan applications. On the whole, the court finds Tan Sri to be a straight forward and credible witness. His testimony was clear, consistent and coherent despite being questioned quite extensively by learned counsel for the 1st to 3rd defendants. In the same vein, the 4th defendant also denied the 1st to 3rd defendants' contention. However, what is pertinent, is the fact that the 1st to 3rd defendants failed to call Ah Siong to give evidence in proof of its allegation. Ah Siong is the principal and key actor in this allegation. It was Ah Siong who allegedly made the representation to the 2nd defendant. The plaintiff did not have the opportunity of cross-examining Ah Siong to challenge him on this vital evidence. No explanation was given for not calling Ah Siong. It is clear that Ah Siong's evidence have been withheld by the 1st to 3rd defendants. In the circumstances, the court is justified in drawing an adverse inference against the 1st to 3rd defendants for failing to call Ah Siong under s. 114(g) of the Evidence Act 1950.

[19] In all the circumstances, the court finds that the defendants' contention is wholly unsubstantiated. Accordingly, the question is answered in favour of the plaintiff.

Whether The 2nd And 3rd Defendants Are Entitled To Be Discharged From Being Guarantors On The Grounds That They Are Prejudiced By The Statement Of The 4th Defendant's Father-In-Law That He Is Able To Get The 4th Defendant Released As A Guarantor Of The 1st Defendant Regardless Of Whether The 2nd And 3rd Defendants Consent To His Release? If Not, Whether There Was Any Proper Demand Made Against The 2nd And 3rd Defendants As Guarantors?

[20] The 2nd and 3rd defendants contention is predicated on Tan Sri's alleged statements made at a meeting at the Bangsar Village on 1 November 2010. According to the defendants, the 2nd defendant, Ah Siong, a lawyer one Ti Kian Huat and the 4th defendant were also present at the meeting. The 2nd defendant testified that Ti who acted for Ah Siong called him to attend the meeting. He said that Tan Sri urged him to sign the board resolution to release the 4th defendant his son-in-law from being a guarantor.

[21] This contention appears to be misplaced. In the first place, the 4th defendant has not been released or discharged as a guarantor. Secondly, Tan Sri said that he attended the meeting after being requested by the 4th defendant to explain to the 2nd defendant about the plaintiff's board decision. Tan Sri said that he spoke in English; which language the 2nd defendant is not conversant with. Tan Sri also denied making the alleged statements. At any rate, Tan Sri explained that he did not have any power to get the 4th defendant released as a guarantor. It is also pertinent to note that the 2nd and 3rd defendants failed to call Ah Siong and Ti to the stand. No explanation was given for this *lacuna*. In the circumstances, the court is constrained to draw an adverse inference against the 2nd and 3rd defendants for their failure to call both material witnesses Ah Siong and Ti.

[22] On the whole, the court finds that the 2nd and 3rd defendants have not satisfied the evidential burden of introducing evidence to prove their allegation. Consequently, the question is answered in the negative. It is also significant to note that the solicitors for the 1st to 3rd defendants subsequently wrote to the court after the conclusion of the trial informing that they have decided to abandon the issue. The court will now consider the question of whether there was any proper demand made against the 2nd and 3rd defendants.

[23] Learned counsel for the 2nd and 3rd defendants argued that the purported demand dated 15 November 2010 was not pleaded since the plaintiff only pleaded that one notice of termination and recall to the defendant. Further, a proper demand is needed to found a cause of action against the guarantors (*Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd* [1987] 2 CLJ 197; [1987] CLJ (Rep) 219; *YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2)* [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187). It was also argued that the notice merely terminated and recalled the loan facilities and demanded payment of the outstanding sum without stating the guarantee. As such there was no proper demand against the guarantors (*United Prime Corp Bhd v. Q-Built Construction (M) Sdn Bhd & Ors* [1987] 1 CLJ 501; [1987] CLJ (Rep) 1048).

[24] The aforesaid argument is misplaced as it is inconsistent with the express terms of the guarantees. Clause 4.1 provides *inter alia* that the obligations of the guarantors 'shall not be subject to any prior notice to or demand to the guarantor with regard to any default of the customer'. It must therefore follow that a demand is not a prior requirement before the plaintiff can enforce the guarantees. Be that as it may, it is in the evidence that the 2nd and 3rd defendants have received the notice. Both the 2nd and 3rd defendants have admitted under cross-examination to having received the notice of termination and recall. The 2nd defendant agreed under cross-examination even after receiving the notice he did not complain to the plaintiff about the rebate or interest on the loan. In all the circumstances above, the court finds that there was a proper demand made on the 2nd and 3rd defendants as guarantors under the guarantees.

Whether The Plaintiff's Claim Is Tainted With Illegality As The Plaintiff Imposed And Levied Interest Or Riba Which Is Repugnant To Islamic Or Shariah Principle Rendering The Entire Claim Unenforceable Under s. 24 Of The Contracts Act 1950

[25] Learned counsel for the 1st to 3rd defendants argued that the plaintiff's claim is tainted with illegality for charging interest or *riba* (*Of Islamic "Loans" And Other Matters of Interest*, Mohamed Ismail bin Mohd Shariff (2000) XXVIX No. 3, The Journal of the Malaysian Bar, 91; *Arab-Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (Third*

Party) And Other Cases [2009] 1 CLJ 419; *Malayan Banking Bhd v. Ya'kup Oje & Anor* [2007] 5 CLJ 311; ss. 2 & 3(5) of the Islamic Banking Act 1983). This contention is premised on statement of account annexed to the plaintiff's amended statement of claim in which the plaintiff had pleaded and claimed for 'overdue interest'. 'Overdue interest' was charged on the 1st defendant's statement of accounts on 30 November 2009, 31 December 2009, 31 October 2010, 28 February 2010, 31 March 2010, 30 April 2010, 31 May 2010, 30 June 2010, 31 July 2010, 31 August 2010, 30 September 2010 and 31 October 2010. The plaintiff is bound by its pleaded case. The plaintiff is not entitled to introduce evidence to contradict its own pleadings (*Ng Ben Thong & 2 Ors v. Krishnan Arumugam* [1997] 1 LNS 85; *Mohd Zaid Ibrahim v. P Kamalanathan P Panchanathan & Ors* [2010] 8 CLJ 608). Since the consideration of the loan facilities is unlawful, the loan facilities are contrary to public policy (s. 24 of the Contracts Act 1950; *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57; *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1; *Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 CLJ 674; *Mustafa Osman v. Lee Chua (P)* [1996] 3 CLJ 494; *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; *Wai Hin Tin Mining Company Ltd v. Lee Chow Beng* [1967] 1 LNS 204).

[26] Learned counsel for the 1st to 3rd defendants also argued that the plaintiff's evidence introduced at the trial should be disregarded and not given any weight. Firstly, the plaintiff did not plead its claim for *Ta'widh* for all the facilities granted under the 1st facility and the 2nd facility. *Ta'widh* was only pleaded in respect of the 2nd facility – in particular TF-i 3 only. Notwithstanding the above, the plaintiff sought judgment for entire *Ta'widh* for the alleged outstanding sum of RM60,137,086. It is insufficient for the plaintiff to merely pray for *Ta'widh* without first pleading the material terms and conditions upon which the plaintiff's claim for *Ta'widh* is founded for each facility (*BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar* [2009] 4 CLJ 599; *Metroplex Development Sdn Bhd v. Mohd Mastana Makaddas & Anor* [1995] 3 CLJ 70; *Tasja Sdn Bhd v. Golden Approach Sdn Bhd* [2011] 2 CLJ 789; *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; *Kopeks Holdings Sdn Bhd v. Bank Islam Malaysia Bhd* [2012] 4 CLJ 941).

[27] Learned counsel for the plaintiff submitted that the letters of offer and the agreements have been pleaded in the amended statement of claim. Further, the imposition of late payment charges *Ta'widh* has been sanctioned by the Shariah Advisory Council of Bank Negara Malaysia's Guideline (BNM/RH/GL 01202) item 8. In fact, Item 85 also sanctions the imposition of late payment charges by the court on judgment debts. Mohd Zawawi J in *CIMB Islamic Bank Bhd v. LCL Corporation Bhd & Anor* [2011] 7 CLJ 594 discussed the issues relating to Islamic banking. In his learned judgment, Mohd Zawawi J held that subject to certain conditions, *Ta'widh* may be imposed on a defaulting customer who fails to meet his obligation to pay the financing.

[28] The relevant facility agreements have been pleaded in the amended statement of claim in support of the plaintiff's claim. It is not a disputed fact that the plaintiff is entitled under the facilities agreements to impose *Ta'widh* in the event of the 1st defendant's default. Further, *Ta'widh* has been pleaded in para. 10.4 of the amended statement of claim. Therefore, the fact that the plaintiff is entitled to impose *Ta'widh* cannot be denied as it is expressly provided under the facilities agreements. *Ta'widh* is also prayed for under prayer (ii) of the amended statement of claim. It follows that there is nothing to preclude the plaintiff from making a claim for *Ta'widh.*

[29] However, the question is whether the words 'overdue interest' appearing in the statement of accounts precludes the plaintiff from making an assertion to the contrary. In *Ng Ben Thong*, *supra,* counsel for the defendant was unable to adduce evidence as the defendant was absent and the court was asked to rely on the defendant's pleadings. The High Court held that pleadings are not evidence; it being a bare averment of a party's case. *Mohd Zaid Ibrahim*, *supra* concerns an election petition. In that case Azahar Mohamed J (later JCA) reiterated the established principle of law that no evidence can be led on a plea not raised in pleadings and that no amount of evidence can cure a defect in the pleadings.

[30] According to para. 17 of the amended statement of claim, the amount owing is set out in the annexed statement of account. The words 'overdue interest' is stated in the statement of account. PW4 said that the words 'overdue interest' appearing in

A the statement of account was due to the computer system which has not been changed to reflect the current practice of the plaintiff. The new system could not override the old records. PW4 explained that it actually connotes late payment charges *(Ta'widh)* at 1.0% per annum on overdue instalment. No interest was
B charged. Late payment charges is expressly provided under the letters of offer and the facilities agreements entered into between the plaintiff and the 1st defendant.

[31] In estimating the weight, if any to be attached to the words
C 'overdue interest' in the statement of account, this court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the words (see s. 73A(6) of the Evidence Act 1950). In particular, the court will consider whether or not the words were made
D contemporaneously with the occurrence or existence of the facts as stated by PW4; and to the question whether or not the plaintiff had any incentive to conceal or misrepresent facts.

[32] It is not disputed that the loan facilities granted to the 1st
E defendant were in the nature of Islamic banking. As alluded to by learned counsel for the 1st to 3rd defendants, interest is prohibited under any circumstances. Clearly, the 1st defendant's intention is to pin the plaintiff down to the words 'overdue interest' in the statement of account so as to taint the loan facilities with illegality.
F PW4 said that statement of accounts were given every six months to the 1st defendant and that every month the plaintiff will also issue a statement on the amount to be paid for each facility. The defendants have never disputed these statements. This is consistent with the 2nd defendant's (DW1) evidence under cross-
G examination that he does not under the statement of account and that he cannot tell whether it is correct or not. DW1 admitted that the plaintiff terminated and recalled the loan facilities because the 1st defendant did not make payments to the plaintiff. He also admitted issuing a letter dated 27 August 2010 to the plaintiff
H wherein he said that the 1st defendant will ensure payment of the outstanding June instalment so that the 1st defendant will turn 'NPL' status. The defendants knew that when they entered into the various facilities agreements with the plaintiff, the loan facilities were in the nature of Islamic banking and not conventional banking.
I

[33] Having considered all the circumstances, the court accepts the explanation given by PW4. It is inconceivable for the plaintiff to impose overdue interest on the 1st defendant when such imposition contravenes the very basis of Islamic banking practice. Further, the rate of charge of 1% is consistent with the rate chargeable for *Ta'widh* under the offer letters and the loan facilities agreements. Consequently, the question is answered in the negative.

Whether The Plaintiff's Demand Dated 15 November 2010 To The 1st, 2nd And 3rd Defendants Is Invalid And Bad In Law?

[34] Learned counsel for the 1st to 3rd defendants also contended that the plaintiff's demand is invalid and bad for demanding an excessive amount; the plaintiff has failed to account for rebate *(Ibra)* and other discounts due to the 1st defendant. In law the burden of proof as to any particular fact lies on the party who wishes to make the court believe in its existence (s. 103 of the Evidence Act 1950; *Karam Singh v. PP* [1967] 1 LNS 65, FC). There is no burden on the opposing party to disprove it (*Eastern Enterprises Ltd v. Ong Choo Kim* [1969] 1 LNS 35). In this instance it is the duty of the 1st to 3rd defendants to produce the necessary evidence in proof of their allegation that the plaintiff failed to account for rebate and other discounts due to the 1st defendant.

[35] At the outset, there is no evidence to show that the 1st to 3rd defendants have even written to the plaintiff to dispute the correctness of the 6th monthly statement of accounts which were sent to the 1st defendant. There is also no evidence to show that they have complained to the plaintiff that they have not been given any rebate or other discounts. In fact, the 2nd defendant testified that he is unable to read the statement of accounts; and that he only knew of these issues during the lunch break when he was in the midst of cross-examination. Learned counsel for the 1st to 3rd defendants sought to substantiate their assertion through the cross-examination of the plaintiff's witnesses PW4.

[36] According to the offer letters and the loan facilities agreements, the granting of rebate *(Ibra)* is at the plaintiff's discretion. Therefore, the 1st defendant is not entitled as of right to claim for any rebate. Be that as it may, PW4 testified that rebate was granted to the 1st defendant as and when the facilities

were disbursed. Under cross-examination, PW4 explained how the rebate was given for the revolving credit facility. In that instance, the original ceiling rate was 9.95%. However, the plaintiff only charged a rate of 7.7%; the rebate being the differential amount between 9.95% less 7.7%. In support of her statement, PW4 referred to a statement of account dated 11 January 2012 (p. 24 of bundle IP). PW4 said that a rebate of RM7,495.80 was given. The rebate amount is the differential between the unearned profit of RM33,148.09 (based on 9.95% ceiling rate) and the unearned profit of RM25,652.29 (based on 7.7% rate). PW4's statement is corroborated by the overall summary of the statement of accounts at pp. 344-346 bundle A2. On the evidence aforesaid, the court is satisfied that rebate was in fact given to the 1st defendant at the time when the facilities were disbursed. The 1st to 3rd defendants' contention that no rebate was given to the 1st defendant is obviously devoid of merit.

[37] The other discounts include *Khusuumah* (discount on selling price/internal rate of return). In her evidence in chief, PW4 said that the other discounts are also granted at the absolute discretion of the plaintiff; this is consistent with the terms and conditions in the offer letters and facilities agreements. PW4 said that *Khusuumah* will only be granted when the 1st defendant makes early settlement of the facilities. In this case the granting of *Khusuumah* did not arise as the 1st defendant failed to repay the principal amount. PW4's evidence-in-chief on this issue was not challenged. In the light of the evidence aforesaid, the court finds that the 1st to 3rd defendants' contention on this issue is unsubstantiated.

[38] For the foregoing reasons, the question is answered in favour of the plaintiff.

Whether The 4th Defendant Was Released And Discharged As A Guarantor For The 1st Defendant In June 2010?

[39] The oral evidence of the 4th defendant and that of Dato' Yusof and En. Tun Yazli are at variance on this issue. The 4th defendant tendered his resignation as a director of the 1st defendant in mid January 2010. On 12 January 2010, the 4th defendant wrote to Dato' Yusof (PW1) asking to be released and discharged as a guarantor. Subsequently, around February 2010, the 4th defendant attended a meeting with Dato' Yusof who

informed him that his release and discharge would be conditional upon obtaining a written confirmation from the co-guarantors (2nd and 3rd defendants). Subsequently, the 2nd and 3rd defendants issued a letter dated 18 February 2010 addressed to the plaintiff confirming their agreement to the 4th defendant being released and discharged as a guarantor. Around June 2010, En. Tun Yazli informed the 4th defendant that the management committee of the plaintiff had approved his application for release and discharge. On or about 4 October 2010, the 4th defendant received a call from En. Tun Yazli asking the 4th defendant to procure the 1st defendant's board resolution for the 4th defendant's release and discharge as guarantor; failing which the plaintiff would made a demand on him as a guarantor. The 4th defendant was unable to procure the requisite board resolution. However, both Dato' Yusof and En. Tun Yazli denied making the statements as alleged by the 4th defendant. Both said that they did not have any authority to make the alleged statements; and that the decision was subject to the plaintiff's board of directors and the terms and conditions of the plaintiff's letter dated 16 August 2010.

[40] In the face of the conflicting oral evidence, the court will examine the documentary evidence. By a letter dated 1 December 2009, the 4th defendant wrote to the 1st defendant tendering his resignation as a director of the 1st defendant company. By a letter dated 12 January 2010, the 4th defendant informed the plaintiff of his resignation as director and requested to be released and discharged as a guarantor for the 1st defendant. On 5 March 2010, the plaintiff received a letter dated 18 February 2010 signed by the 2nd and 3rd defendants. The 2nd and 3rd defendants informed of their agreement to the release and discharge of the 4th defendant as a guarantor. On 9 March 2010, the plaintiff wrote to the 1st defendant stating that the withdrawal of guarantors is subject to the board of directors' approval and asked for the details of the proposed replacement guarantor. On 27 April 2010, the 1st defendant replied stating that they were unable to find a suitable replacement guarantor. Matters came to a head after the 4th defendant received two letters of demand dated 13 October 2010 and 15 November 2010 from the plaintiff's solicitors. On 5 January 2011 the 4th defendant wrote to the plaintiff reiterating his assertion that En. Tun Yazli had around mid 2010 informed him of his release and discharge as a

guarantor. In that letter the 4th defendant asked the plaintiff to confirm his release and discharge and to withdraw the letter of demand. The plaintiff did not respond to the 4th defendant's letter.

[41] Learned counsel for the 4th defendant submitted that the release and discharge of the 4th defendant as a guarantor can be effected by way of an oral agreement as in this case. The 4th defendant was dealing in good faith with the plaintiff and is entitled to assume that the acts within its constitution and powers have been properly performed. The representation of Dato' Yusof was not doubted and relied upon (*Tan Ah Tong v. Perwira Habib Bank Malaysia Bhd* [1998] 3 CLJ 833 CA). The 4th defendant is not bound to inquire whether the acts of internal management have been regular (*Turquand*'s rule; *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793). The subsequent requirement by the plaintiff of the 1st defendant's board resolution is a mere formality to reflect the 1st defendant's previous agreement (as in its letter dated 18 February 2010) to release and discharge the 4th defendant as a guarantor (*In Re Duomatic Ltd* [1969] 2 Ch 365)

Decision

[42] On the evidence, it is clear that the 2nd and 3rd defendants' letter dated 18 February 2010 confirming their agreement to the 4th defendant's release as a guarantor was procured by the 4th defendant pursuant to the meeting between the 4th defendant and Dato' Yusof. In the meantime, the plaintiff wrote to the 1st defendant asking for a replacement guarantor. In April 2010, the 1st defendant informed the plaintiff that no suitable replacement could be found. In June 2010, the 4th defendant was informed by En. Tun Yazli of his release and discharge. However, about two months later, the plaintiff wrote to the 1st defendant imposing additional conditions for the release of the 4th defendant. What is significant is that in that letter the plaintiff did state their agreement to discharge the 4th defendant. What is also significant is the plaintiff's failure to rebut or dispute the 4th defendant's assertions in his letter dated 5 January 2011. Unfortunately, Dato' Yusof's evidence on this point is vague; he agreed that he did not reply to that letter. He was not sure if he passed the letter to the department concerned. En. Tun Yazli evidence is also

equivocal; he admitted receiving that letter but was unsure if the plaintiff replied to it. There did not seem to be any necessity to rebut the 4th defendant's serious assertions contained therein. In short, there was no rebuttal or dispute of the 4th defendant's assertions. More importantly, the plaintiff failed to dispute the specific assertions of the 4th defendant that:

(i) to obtain his release and discharge the plaintiff told him that he was required to procure the consent and agreement of the remaining directors cum co-guarantors;

(ii) relying on that representation, he procured the letter of consent and agreement from the 2nd and 3rd defendants dated 18 February 2010; and

(iii) around the middle of 2010, En. Tun Yazli informed him that the management of the plaintiff had considered his application and had agreed to release him as a guarantor.

[43] On the evidence aforesaid, the court finds on a balance of probabilities that the 4th defendant's version of the events is more plausible. The additional terms which the plaintiff then sought to impose in October 2010 are of no effect insofar as they relate to the 4th defendant. Dato' Yusof and En. Tun Yazli are senior officers of the plaintiff bank. They did not inform the 4th defendant that they did not have the authority to do so. Having agreed to discharge the 4th defendant, the plaintiff's attempt to backtrack and ask for a replacement guarantor and the 1st defendant's board of directors' resolution, amongst others is of no avail.

[44] In *Tan Ah Tong v. Perwira Habib Bank Malaysia Bhd*, *supra* the Court of Appeal held that the appellant was entitled to rely on a letter issued by the bank's then senior general manager (DW1) which purportedly confirmed the guarantor's application to be discharged as a guarantor. The appellant was not told that DW1 had no authority. The letter did not specify the authority or the manner the release or discharge is to be executed. In the circumstances, the appellant was entitled to invoke the indoor management rule in his favour. The Court of Appeal also held that the discharge may even be oral or be effective as a waiver or as an estoppel.

[45] Applying the principles of *Tan Ah Tong*, *supra* the court holds that in the circumstances of this case, as an outsider the 4th defendant is not bound to inquire whether the actions of Dato' Yusof and En. Tun Yazli have been regular. The 2nd and 3rd defendants have already signified their consent and agreement to the 4th defendant's release and discharge as a guarantor. There was no way for the 4th defendant to know the inner workings and inner management procedures of the plaintiff. In the circumstances, the 4th defendant is entitled to rely on the authority of both Dato' Yusof and En. Tun Yazli to discharge him as a guarantor. The court agrees with the submission of learned counsel for the 4th defendant on this issue. For the foregoing reasons, the court finds that the 4th defendant was released and discharged as a guarantor for the 1st defendant in June 2010.

Conclusion

[46] The plaintiff having proven a *prima facie* case, the burden of introducing evidence to prove their defence fell upon the defendants. After considering the evidence and the submission of counsel of the defendants, the court is not satisfied that the 1st to 3rd defendants have proven their allegation that the loan facilities granted to the 1st defendant are unenforceable for being tainted with illegality or in breach of public policy. The 2nd and 3rd defendants also contended that they were discharged as guarantors for being prejudiced by the alleged statements of Tan Sri was abandoned after the trial. There is no evidence to substantiate their allegation. The court also found that there was a proper demand made on the 2nd and 3rd defendants as guarantors. The defendant's contention that the plaintiff's claim is illegal because interest was imposed is also without merit; the words 'overdue interest' appearing in the statement of account was a carry-over of the old computer system; in fact no interest was charged. What was charged was late payment charge *(Ta'widh)* – which the plaintiff is entitled to charge under the offer letters and facilities agreements. As such, the allegation of illegality is unfounded. The defendants also contended that the plaintiff's demand is invalid and bad in law because the amount claimed is excessive; since the plaintiff failed to account for rebate *(Ibra)* and other discounts. The fact that a rebate was given when the facilities were disbursed was illustrated by PW4 in her evidence

under cross-examination. The other discounts in particular *Khusuumah* which is a discount on the selling price/internal rate of return was not given; the reason as explained by PW4 is simply that firstly it is given at the plaintiff's discretion if there is early prepayment of the loan facilities. Second, the granting of *Khusuumah* did not arise as the 1st defendant failed to repay the principal amount. In all the circumstances, the defendants' contention is unsubstantiated and devoid of merit. Lastly, the court found that the 4th defendant was released and discharged as a guarantor in June 2010. There is evidence to support the fact that the plaintiff did intimate to the 4th defendant of his release and discharge. This is fortified by the fact that for reasons unexplained, the plaintiff decided not to rebut or dispute the 4th defendant's serious allegations in his letter dated 5 January 2011.

[47] For the foregoing reasons, the plaintiff's claim against the 1st to 3rd defendants is allowed in prayer (i) for the sum of RM60,137,086.96; (ii) and costs. The claim against the 4th defendant is dismissed with costs. The 4th defendant's counterclaim is allowed in prayer (A) and (B) with costs. The counterclaim for damages is not allowed as the 4th defendant did not produce any evidence to show how he suffered loss and damages, embarrassment, humiliation, stress, loss of credit and reputation.

[48] Parties invited to submit on issue of costs.